Australian Government
Australian Law Reform Commission

Professor Rosalind Croucher
President

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Inquiry Secretary
Standing Committee on Social Policy and Legal Affairs
Department of the House of Representatives
Parliament House
Canberra
ACT 2600

By email: spla.reps@aph.gov.au

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Inquiry into the Privacy Amendment (Enhancing Privacy Protection) Bill 2012: Answers to Questions on Notice 16 August 2012

I refer to the Questions on Notice concerning the *Privacy Amendment (Enhancing Privacy Protection) Bill 2012* (the Bill) provided to the Australian Law Reform Commission (ALRC) by the Standing Committee on Social Policy and Legal Affairs by email dated 16 August. I provide the following responses.

Question 1: ALRC report

The review of the *Privacy Act*, conducted from January 2006 to May 2008, was a major undertaking and culminated in the final report *For Your Information—Australian Privacy Laws and Practice* (ALRC 108).

ALRC 108 contained 295 recommendations for reform. The first stage of the Government's response to the report addressed 197 of these recommendations, of which, 175 were accepted in whole or in part; another 20 were not accepted; and two were simply noted.

The ALRC understands that the remaining parts of the Government's first stage response (relating mainly to health services and research provisions), and the recommendations that it is yet to respond to, will be considered after the Bill has been enacted.

The Bill implements the major legislative elements of the Government's first stage response. Among other things, the Bill would amend the *Privacy Act* to:

- create the Australian Privacy Principles (APPs), a single set of privacy principles applying to both Commonwealth agencies and private sector organisations (referred to as APP entities), which replace the Information Privacy Principles for the public sector and the National Privacy Principles (NPPs) for the private sector;
- introduce more comprehensive credit reporting with improved privacy protections, at the same time rewriting the credit reporting provisions to achieve greater logical consistency, simplicity and clarity and updating the provisions to address more effectively the significant developments in the operation of the credit reporting system since the provisions were first enacted in 1990;
- introduce new provisions on privacy codes and the credit reporting code, including powers for the Commissioner to develop and register codes in the public interest that are binding on specified agencies and organisations; and

Australian Law Reform Commission
Level 40, MLC Centre
19 Martin Place
Sydney NSW 2000

Postal Address:
GPO Box 3708
Sydney NSW 2001

Tel (02) 8238 6333
Fax (02) 8238 6363

Web www.alrc.gov.au
Email info@alrc.gov.au

- clarify the functions and powers of the Commissioner and improve the Commissioner's ability to resolve complaints, recognise and encourage the use of external dispute resolution services, conduct investigations and promote compliance with privacy obligations.

The Bill, if enacted, would substantially implement recommendations made in ALRC 108.

Given the breadth and complexity of the provisions of the Bill, it is not surprising that there are areas where the Government has chosen to take a different approach from that recommended by the ALRC.

In some cases, this divergence is more a matter of the chosen drafting mechanisms, or the location of provisions, than constituting any significant policy difference. For example:

- The ALRC recommended that the 'Use and Disclosure' principle should contain an exception permitting the use or disclosure of an individual's personal information if the agency or organisation reasonably believes that the use or disclosure is necessary to lessen or prevent a serious threat to an individual's life, health or safety; or public health or public safety (ALRC 108, Rec 25–3). Rather than incorporating this provision in APP 6, the Bill would implement this recommendation through its 'permitted general situation' provisions (item 1 of the table in s 16A).
- The ALRC recommended that new credit reporting privacy regulation be implemented through subordinate legislation (ALRC 108, Rec 54–1). Rather than taking this path, the Bill would implement new credit reporting privacy regulation through amendments to pt IIIA of the Act.

Some of the areas where the Government response differs significantly from the recommendations of the ALRC have been highlighted in submissions by the ALRC to this Committee and to the Senate Standing Committee on Finance and Public Administration.

These differences include, for example, the introduction of provisions to permit agencies and organisations to disclose personal information to assist investigations into the location of missing persons; and to allow the use of credit reporting information for pre-screening to determine whether or not individuals are eligible to receive direct marketing about consumer credit.

The role of the ALRC includes ensuring that the Government and members of Parliament are aware of the conclusions reached and recommendations made in recent ALRC reports. However, once its recommendations have been given due consideration by Government, the ALRC does not have any ongoing remit to advocate for implementation. The ALRC also recognises that changes in circumstance since the delivery of an ALRC report may justify legislative responses that differ from its recommendations—for example, in the case of pre-screening, the introduction of responsible lending obligations in the *National Consumer Credit Protection Act 2009* (Cth).

The ALRC considers that due consideration was given to its recommendations.

Question 2: The term 'reasonably necessary'

The ALRC does not harbour concern about the use of the term 'reasonably necessary'. In making its recommendations in ALRC 108, and in its model Unified Privacy Principles (UPPs), which formed one template for the APPs in the Bill, the ALRC chose to use the unmodified term 'necessary'. This was consistent with the drafting of the existing NPPs (with the exception of one provision in NPP 2).

The Explanatory Memorandum to the Bill (at p 53) states that this wording ensures that whether the collection, use or disclosure is reasonably necessary is to be assessed from the perspective of a reasonable person (not merely from the perspective of the entity proposing to undertake the activity). To this extent, the modified wording seems more likely to enhance, rather than detract, from privacy protection.

Question 3: De-identified information

In its report, the ALRC observed that credit reporting information may be used in the building of statistical models, including credit scoring systems. Credit scoring is described as the use of 'mathematical algorithms or statistical programmes that determine the probable repayments of debts by consumers, thus assigning a score to an individual based on the information processed from a number of data sources' (ALRC 108, para 52.14).

The ALRC did not make any recommendations on whether the use of credit reporting information in statistical modelling and data analysis relating to the assessment or management of credit should be regulated where credit reporting information has been de-identified.

Information privacy legislation, including the *Privacy Act*, generally only regulates the use and disclosure of personal information (that is, information about an individual who is reasonably identifiable). To this extent, s 20M of the Bill may be considered anomalous in regulating credit reporting information that has been de-identified.

However, the Explanatory Memorandum notes that the provision is intended, among other things, to address concerns about 'the effectiveness of methods used to de-identify personal information and the risks of that information subsequently being linked again to individuals in a way that allows them to be identified'. In that context, de-identified credit reporting information may be an appropriate target for privacy regulation.

Question 4: APP 8 cross-border disclosure

The ALRC's recommendations on the drafting of a 'Cross-border Data Flows' principle are set out in detail in ALRC 108 (see Chapter 31, Recommendations 31–1 to 31–5, model UPP 11). The Government accepted the ALRC's recommendations in relation to cross-border data flows, and this is reflected in the drafting of APP 8 of the Bill, subject to some amendment.

An important area of divergence is that the ALRC recommended that an agency or organisation in Australia might comply with privacy obligations relating to the cross-border transfer of personal information if it 'reasonably believes that the recipient of the information is subject to a law, binding scheme ***or contract*** which effectively upholds privacy protections that are substantially similar' to privacy principles under Australian law (emphasis added).

One factor that may have influenced the ALRC formulation is that the European Union *Directive on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data* (EU Directive) explicitly recognises that contracts may be one method of ensuring that personal data transferred from one country to another receives 'adequate protection'. (One of the drivers behind reform of the *Privacy Act* has been to facilitate trade with European countries by having the *Privacy Act* deemed adequate for the purposes of the EU Directive.)

In comparison, APP 8 of the Bill provides that such an exception should only apply in situations where the recipient 'is subject to a law, or binding scheme, that has the effect of protecting the information in a way that, overall, is at least substantially similar to the way in which the APPs protect the information', and there are 'mechanisms that the individual can access to take action to enforce that protection of the law or binding scheme'.

The latter wording reflects the Government's view, as expressed in its first stage response to ALRC 108, that while contracts are important mechanisms for agencies and organisations to impose obligations upon recipients, they should not provide an exception from the general accountability obligations.

In this respect, the balance reflected by the ALRC's recommendation may be seen as tilting somewhat more towards business convenience or workability than privacy protection, as compared to APP 8. However, the ALRC expresses no view on whether this represents a more satisfactory balance than the formulation incorporated in the Bill.

We hope this advice will be of assistance to you. If you require any further information please do not hesitate to contact me on [redacted]

Yours sincerely,

[redacted]

Professor Rosalind Croucher